IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREY APONTE,

OPINION AND ORDER

Plaintiff,

14-cv-132-bbc[1]

v.

DR. SULIENE, DR. SPRING, DR. HEINZL,
DR. MARTIN, HSU MANAGER N. WHITE,
HSU MANAGER ANDERSON,
NURSE JEREMY BREHM, NURSE JOE REDA,
NURSE STRECKER, LT. MORRISON,
SGT. ANDERSON, SGT. TULLEY
and JOHN AND JANE DOES,

Defendants.

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Plaintiff Andrey Aponte, a prisoner incarcerated at the Columbia Correctional Institution, has submitted a proposed civil action under 42 U.S.C. § 1983, alleging that numerous prison officials have failed to give him proper medical treatment and restrict him from working following abdominal surgery. Plaintiff seeks leave to proceed in forma pauperis and has made an initial partial payment of the filing fee as previously ordered by the court. The next step is to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28

[1] I am assuming jurisdiction over this case for the purpose of issuing this order.

U.S.C. § 1915. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). After considering plaintiff's allegations, I conclude that plaintiff may proceed on Eighth Amendment deliberate indifference and state-law negligence claims regarding his care.

I draw the following allegations from plaintiff's complaint.

ALLEGATIONS OF FACT

A. Abdominal Pain and Treatment

Plaintiff Andrey Aponte is a prisoner incarcerated at the Columbia Correctional Institution, located in Portage, Wisconsin. On July 28, 2011, plaintiff underwent abdominal surgery at Waupun Memorial Hospital, performed by Dr. Reynolds (a non-defendant). An unidentified doctor told plaintiff that he would not return to his prison job as a kitchen worker for six weeks.

On August 19, 2011, Sergeant Jakusz (a non-defendant) told plaintiff that he did not have a work restriction. On August 23, 2011, defendant John Doe staff members forced plaintiff to go back to work. As part of his job, plaintiff had to lift a three-to-five-gallon crate of milk. When he did so, he suffered severe sharp pains in his abdomen. Plaintiff saw defendant John Doe nurse, who told him that he had "pulled a muscle" and prescribed ibuprofen for the pain.

Plaintiff made a written request to find out who "released" him back to work. On August 31, 2011, defendant nurse Jeremy Brehm responded, "Our records show that you

were never on any work restrictions." However, upon reviewing his medical records on September 2, 2011, plaintiff discovered written orders by Dr. Reynolds from the hospital, stating, "Return to work when your doctor indicates: [and] No heavy lifting more than 10 pounds [gallon of milk]." Plaintiff believes that defendants Dr. Suliene, Health Services Unit manager N. White and John Doe staff members decided not to give him a work restriction and instead forced him to work following the surgery.

On September 8, 2011, defendant Suliene ordered a work restriction for plaintiff. However, plaintiff discovered that defendant John Doe Health Services Unit staff member told Sgt. Jakusz that plaintiff could work "full duty" with the exception of pushing food carts. Consequently, plaintiff was forced to return to work, which included lifting objects, "dumping big buckets of mop water" and stretching "at all angles," causing him severe pain, headaches and emotional distress.

Plaintiff met with Dr. Reynolds on October 3, 2011. Reynolds prescribed plaintiff ibuprofen and vicodin. However, plaintiff never received the vicodin because defendant Suliene did not agree that this medication was appropriate for "muscle strain two months after [plaintiff's] initial surgery." Plaintiff continued to suffer from severe abdominal pain and emotional distress.

On April 24, 2012, plaintiff was sent to the University of Wisconsin Hospital to be examined for his complaints of abdominal pain. The "pain specialist" recommended "increasing . . . pain medication to 1-2 tablets of vicodin" (plaintiff does not say how often). That same day, plaintiff wrote to the Health Services Unit asking why he was not receiving this medication. The next day, he received a response from defendant Jane Doe stating,

"You continue to receive hydrocodone/APAP 4x 1 day. The MD here only prescribed one tablet based on recommendation from UW." Plaintiff wrote to defendant Suliene about the medication, and Suliene responded by stating that the narcotic medication was to be taken "when [plaintiff] need[s] them very much . . . . Not all the time." Plaintiff continued to suffer severe pain.

On May 5, 2012, plaintiff told Sgt. Beech (a non-defendant) several times between 10 p.m. and midnight that he needed medical care because he felt "really bad." Beech told him that he would check with his supervisor, defendant John Doe. Ultimately, at 1 a.m. Beech told plaintiff that defendant Lieutenant Morrison said that the person on call (defendant John Doe) told him that plaintiff did not need medical care until morning. Plaintiff "begged" Beech to let him speak with Morrison. Beech told plaintiff that Morrison told him he would speak with plaintiff at a later time. Plaintiff banged on the door of his cell pleading for help. At 3 a.m., Morrison came to plaintiff's cell and told him that defendant nurse Strecker said that she would see plaintiff in the morning. In the meantime, Morrison would "monitor" plaintiff because there was no medical staff on duty. Plaintiff asked Morrison whether he was depriving him of medical care. Morrison answered, "Yes." As a result of this deprivation of treatment, plaintiff suffered severe abdominal pain and emotional distress. He was taken to the emergency room "where the medical staff put a tube down his nose and then rushed him to [UW Hospital] where he had to stay receiving medical care for 3 days."

Plaintiff's emotional distress was so great that he had to be treated by a psychiatrist

(he does not name the psychiatrist as a defendant).

On March 3, 2013 at 1 a.m., plaintiff told defendant Sgt. Tully that he was in severe abdominal pain. Tully said that he would let someone know, but no help came. At Tully's 2 a.m. rounds, plaintiff told Tully that he needed either medication or a visit by a medical professional. Tully said that he would speak to the on-call nurse. When he returned, Tully told plaintiff that defendant nurse Strecker told him that plaintiff had "maxed out" his medication, so he could not take any more medication until the morning. Plaintiff asked to talk to Strecker, but Tully told him "that's not going to happen," even though prison policies allow it.

Plaintiff was seen in May 2013 at the UW Hospital and was sent to the Divine Savior Hospital emergency room in July 2013. Both doctors suggested that plaintiff see a gastrointestinal specialist.

On August 9. 2013, defendant Dr. Heinzl met with plaintiff regarding his complaints of stomach pain. Heinzl stated that CT scans showed several hernias and he wondered whether that was causing the pain or bowel obstruction (plaintiff does not say when these scans were taken). Heinzl stated that Dr. Martin, a surgeon, would be coming to the prison in about two weeks, and he scheduled an appointment for plaintiff to meet with Martin.

After this meeting, plaintiff wrote to Health Services Unit manager Anderson, stating that doctors at the UW Hospital and Divine Savior Hospital recommended plaintiff see a gastrointestinal specialist, but that Heinzl wanted plaintiff to wait two weeks to see Dr. Martin. Plaintiff remained in severe pain. On August 13, 2013, defendant Jane Doe told

plaintiff she had scheduled an appointment for him with Dr. Martin, but she did not prescribe anything for plaintiff's pain.

At some point on or before August 22, 2013, plaintiff met with Dr. Martin, who did not prescribe anything stronger than Tylenol or naproxen for his severe pain. (I infer from plaintiff's allegations that he was no longer receiving vicodin.) Between August 22 and September 17, 2013, plaintiff made several requests to the Health Services Unit for stronger medication for his pain. Defendants Anderson, nurse Joe Reda and Jane Doe refused to give him anything stronger.

On September 17, 2013, plaintiff was sent to the UW Hospital to meet with "specialist" Dr. Greenberg. Greenberg concluded that plaintiff would need surgery for his hernias and stated that he would prescribe plaintiff stronger medications. Between September 17 and October 31, 2013, plaintiff made several requests for stronger pain medication, but defendants Anderson and Jane Doe would not provide the medication.

It appears that plaintiff had surgery on October 31, 2013. After the surgery, a UW doctor prescribed "5 to 15 mg of vicodin for the extreme pain that [he] was suffering," but when he returned to the Columbia Correctional Institution, defendants nurse Jane Doe and Dr. Spring would not allow him to have the full prescribed dosage. Plaintiff continued to have severe pain. On numerous occasions between September 17, 2013 and January 24, 2014, plaintiff made requests for more medication or a stronger medication but defendants Anderson and Jane Doe denied his requests.

B. Removal of Staples

At the close of plaintiff's July 28, 2011 abdominal surgery, the doctors closed his surgical wounds with staples. Dr. Reynolds stated that the staples should be removed after 14 days. However, defendants Suliene, White and John and Jane Does did not arrange for that to happen until 21 days later. On August 18, 2011, a University of Wisconsin Hospital staff member came to the Columbia Correctional Institution and removed the staples. Plaintiff suffered severe pain from the skin growing over the staples and removal of the staples was also extremely painful.

C. Ostomy Bag

Following plaintiff's July 28, 2011 surgery, plaintiff had to use an ostomy bag to collect waste. At midnight on July 24, 2012, plaintiff showed defendant Sergeant Anderson that the bag was leaking and needed to be changed. Anderson left and did not return until his next hourly round at 1 a.m. Anderson asked plaintiff whether he could wait until first shift in the morning to change the bag. Plaintiff told him that he could not, because it was "soiling his underwear and not being able to change them." Anderson said that he would let defendant Reda know. Anderson did not come back until his 2 a.m. round, at which time he told plaintiff that he would have to wait until "first thing in the morning." Plaintiff was not seen by Health Services Unit staff until 12:30 p.m. Staff told plaintiff that whenever there is a leak in the bag it must be changed immediately.

OPINION

Plaintiff says that he wishes to bring claims against defendant prison officials for violating his right to adequate medical care under both Eighth Amendment and Wisconsin negligence theories. I understand from plaintiff's allegations that he is saying that defendants violated his rights in the following ways:

1. Defendant John Doe staff members forced plaintiff to work on August 23, 2011 despite his recent surgery.

2. Defendants Dr. Suliene, Health Services Unit manager N. White and John Doe staff members decided not to give him a work restriction and instead forced him to work following the surgery.

3. On September 8, 2011, defendant John Doe Health Services Unit staff member told Jakusz that plaintiff could work "full duty," which led to plaintiff's re-injuring himself.

4. Defendant Suliene would not give plaintiff the vicodin that was recommended by Dr. Reynolds.

5. Defendants Jane Doe and Suliene did not follow the April 24, 2012 "pain specialist's" recommendation to increase his pain medication.

6. On May 5, 2012, defendants John Doe, Lieutenant Morrison and nurse Strecker were aware that plaintiff needed medical help but delayed acting until the next morning.

7. On March 3, 2013, defendants Sergeant Tully and nurse Strecker were aware that plaintiff needed medical help but delayed acting until the next morning.

8. Defendants Health Services Unit manager Anderson, Dr. Heinzl and Jane Doe allowed plaintiff to wait two weeks to see a gastrointestinal specialist and did not prescribe anything for his pain.

9. Defedant Dr. Martin saw plaintiff but did not prescribe stronger medication for his severe pain.

10. Between August 22 and September 17, 2013, defendants Anderson, nurse Reda and Jane Doe refused to give plaintiff stronger medication for his pain.

11. Between September 17 and October 31, 2013, defendants Anderson and Jane Doe would not provide plaintiff with stronger medication.

12. After plaintiff's October 21, 2013 surgery, defendants Jane Doe and Dr. Spring did not allow plaintiff to have the full dosage of vicodin prescribed by the UW doctor, and defendants Anderson and Jane Doe denied his requests for stronger medication.

13. Following plaintiff's July 2011 abdominal surgery, defendants Suliene, White and John and Jane Does did not arrange for removal of the staples from plaintiff's surgical wounds until a week later than directed, causing him severe pain.

14. Overnight on July 24, 2012, defendants Sergeant Anderson and Reda would not arrange for plaintiff's leaking ostomy bag to be changed.

A. Eighth Amendment Deliberate Indifference

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Id. at 104.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results

in needless pain and suffering, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that defendant was aware that the prisoner needed medical treatment but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. Estelle, 429 U.S. at 104-05; Gayton v. McCoy, 593 F.3d 610, 619 (7th Cir. 2010); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007). Deliberate indifference can include persisting in treatment "known to be ineffective." Greeno v. Dailey, 414 F.3d 645, 655 (7th Cir. 2008).

However, inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) ("[E]ven admitted medical malpractice does not give rise to a constitutional violation.").

From the allegations in plaintiff's complaint, I understand that he is contending that defendants have been deliberately indifferent to his medical condition following his August

2011 surgery in a number of ways, such as disregarding the risk to him performing strenuous physical activity immediately following the surgery, ignoring his complaints of pain and requests for effective pain medication, disregarding the risks of leaving in his surgical staples longer than proper and failing to get treatment for his leaking ostomy bag. These actions resulted in further harm to plaintiff (I can infer from plaintiff's allegations that his hernias were caused by the work he was forced to do while recovering from the surgery) and caused him severe pain. Accordingly, I will allow him to proceed on each of the enumerated claims.

B. State Law Negligence

I understand that plaintiff is alleging that defendants' actions were also negligent under Wisconsin law. Wisconsin negligence claims include the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. Paul v. Skemp, 2001 WI 42 ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860 (2001). Plaintiff is alleging that each defendant failed to properly address his medical needs in ways that ended up harming him. Accordingly, he may proceed on each of the above-numerated claims on a state-law negligence theory. With regard to his claims against the defendants who are medical professionals, plaintiff should be aware that unless the situation is one in which common knowledge affords a basis for finding negligence, medical malpractice cases require expert testimony to establish the standard of care. Christianson v. Downs, 90 Wis. 2d 332, 338, 279 N.W.2d 918, 921 (1979). Plaintiff may have to show that the medical professional

defendants failed to use the required degree of skill exercised by a reasonable medical professional, that was caused by defendants' failures. Wis J-I Civil 1023.

C. Proper Defendants

Several issues must be addressed to clarify the identities of the defendants in this case. First, although plaintiff nurse Jeremy Brehm is a defendant, the only allegation plaintiff includes about this defendant is that he told plaintiff that "[o]ur records show that you were never on any work restrictions." Merely explaining the status of plaintiff's work restriction (or lack thereof) does not exhibit deliberate indifference toward plaintiff, so I will dismiss Brehm from the case.

Next, plaintiff includes allegations about Sergeant Beech's failure to take action to assist him on May 5, 2012, but plaintiff does not include Beech in the caption or name him as a defendant elsewhere in the complaint, so I cannot allow him to proceed on any claims against Beech.

Finally, plaintiff is proceeding against several unidentified "John and Jane Doe" defendants. At the upcoming preliminary pretrial conference for this case, Magistrate Judge Stephen Crocker will explain the process plaintiff must use to identify the Doe defendants through the discovery process and amend his complaint to add the defendants' full names.

ORDER

IT IS ORDERED that

1. Plaintiff Andrey Aponte is GRANTED leave to proceed on Eighth Amendment deliberate indifference and state-law negligence claims against defendants Dr. Suliene, Dr. Spring, Dr. Heinzl, Dr. Martin, N. White, HSU Manager Anderson, Joe Reda, Nurse Strecker, Lt. Morrison, Sgt. Anderson, Sgt. Tully and John and Jane Does, as set out in the opinion above.

2. Plaintiff is DENIED leave to proceed on any claims against defendant Jeremy Brehm and this defendant is DISMISSED from the case.

3. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 15th day of April, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge